

March 15, 2002

Lt. Col. Glen R. DeWillie
District Engineer
Department of the Army
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

Mr. Richard Tomer
Acting Chief, Regulatory Branch
Department of the Army
New York District, Corps of Engineers
Jacob K. Javits Federal Building
New York, New York 10278-0090

Re: F-2002-0108 (DA)
U.S. Army Corps of Engineers - Reissuance and Modification of
Nationwide Permits and Conditions
Statewide Coastal Areas

Dear Lt. Col. DeWillie and Mr. Tomer:

The DOS has completed its review of the U.S. Army Corps of Engineers (Corps) consistency determination indicating that the proposed reissuance and modification of its nationwide permits (NWP) pursuant to 33 CFR Part 330 is and will be conducted in a manner consistent to the maximum extent practicable with the New York State Coastal Management Program.

1. Pursuant to 15 CFR Part 930.41, the DOS concurs with the Corps consistency determination for the following NWPs:
 2. Structures in Artificial Canals
 4. Fish and Wildlife Harvesting, Enhancement and Attraction Devices
 5. Scientific Measuring Devices
 10. Mooring Buoys
 15. U.S. Coast Guard Approved Bridges
 20. Oil Spill Cleanup
 21. Surface Mining Activities
 24. State Administered Section 404 Program

34. Cranberry Production Activities

37. Emergency Watershed Protection and Rehabilitation

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II. The DOS concurs with the Corps consistency determination for the following NWP's where the activities to be authorized would be conducted within canals that are more than fifty percent (50%) bulkheaded (see III below regarding NWP #3, and IV below regarding NW #13):

3. Maintenance

13. Bank Stabilization

III. The DOS concurs with the Corps consistency determination for the following NWP's where the activities to be authorized would occur outside of the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans.

However, pursuant to 15 CFR Parts 930.41 and 930.43(b), the DOS objects to the Corps consistency determination for the following NWP's where the activities would occur within the above listed special management areas:

1. Aids to Navigation

3. Maintenance (except in canals that are more than 50% bulkheaded - see II above)

6. Survey Activities

7. Outfall Structures

9. Structures in Fleeting and Anchorage Areas

11. Temporary Recreational Structures

12. Utility Line Activities

14. Linear Transportation Projects

16. Return Water From Upland Contained Disposal Areas

18. Minor Discharges

19. Minor Dredging

22. Removal of Vessels

- 23. Approved Categorical Exclusions
- 25. Structural Discharges
- 26. [reserved]
- 27. Wetland and Riparian Restoration and Creation Activities
- 28. Modifications of Existing Marinas
- 29. Single-family housing
- 30. Moist Soil Management for Wildlife
- 31. Maintenance of Existing Flood Control Activities
- 32. Completed Enforcement Activities
- 33. Temporary Construction, Access and Dewatering
- 35. Maintenance Dredging of Existing Basins
- 36. Boat Ramps
- 38. Cleanup of Hazardous and Toxic Waste
- 39. Residential, Commercial, and Institutional Developments
- 40. Agricultural Activities
- 41. Reshaping Existing Drainage Ditches
- 42. Recreational Facilities
- 43. Stormwater Management Facilities
- 44. Mining Activities

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IV. The DOS also objects to the Corps consistency determination for the following NWP anywhere in the New York coastal area:

- 8. Oil and Gas Structures
- 13. Bank Stabilization (except in canals that are more than 50% bulkheaded - see II above)
- 17. Hydropower Projects

Basis for Decision

The nationwide permits listed in III and IV above could authorize activities which would be inconsistent with one or more of the State's CMP policies and federally approved amendments to the CMP.

In III, where the activities would be located within the CMP special management areas, the activities should not be subject to a nationwide or regional permit and if so conducted, would be inconsistent with the CMP. These activities would affect the State's

CMP policies pertaining to: water dependent uses (Policies #1, #2, #3, #4, #20, #21); appropriate development in appropriate areas and expediting permits for that development (Policies #1, #2, #5, #6); the protection, preservation, and where practicable restoration of State designated significant coastal fish and wildlife habitats (Policy #7); the protection of fish and wildlife from pollutants and hazardous wastes (Policies #8, #31, #34, #35, #36, #38, #40); flooding and erosion hazards (Policies #11, #12, #13, #14, #15, #16, #17); infringements on the public use of coastal waters and water related recreational uses (Policies #19, #20, #21, #22); the conservation of agricultural lands (Policies #26, #35); the preservation and protection of freshwater and tidal wetlands and the benefits derived from them (Policy #44); and the protection of the quality of coastal waters (Policies #30, #31, #33, #34, #35, #36, #39).

The NWPs listed in III, where the activities would be located within the CMP special management areas, and IV above were determined not to be consistent to the maximum extent practicable with the State CMP policies for several reasons: 1) the specific nature of the authorized activity is unknown (e.g. structures in artificial canals, approved categorical exclusions, completed enforcement actions); 2) the size or extent of the authorized activity is limitless (e.g. utility line backfill and bedding, structural discharges, maintenance dredging of existing basins); 3) the established thresholds for an activity are excessive (e.g. bank stabilization, headwaters and isolated waters discharges) ; 4) the provisions of the permits do not reflect the existing conditions of the geographic areas in which the authorized activity would occur; 5) coordinated review of authorized activities which may affect land and water uses and natural resources in the coastal area of New York State will be limited; and 6) the mitigation condition does not advocate "avoidance" and viable alternatives as the principal means of minimizing adverse effects on coastal waters, habitats, wetlands, special aquatic sites; and 7) the authorized activities could be inconsistent with locally adopted and State and federally approved plans as expressed in federally approved amendments to the CMP.

Alternative Measures - Regional Conditions

Pursuant to 15 CFR Part 930.43(a)(3), DOS should describe alternative measures which, if adopted by the Corps, would allow the Corps to proceed with the reissuance and modification of NWP's in a manner consistent to the maximum extent practicable with the CMP.

According to 33 CCFR 330.4(d)(2), the Division or District Engineers may establish regional conditions for NWP's that would make them consistent with the CMP.

To ensure that the Corps' NWP's and activities authorized by them would be consistent with the CMP and approved LWRP's, the following conditions should apply to: 1) the NWP's listed in III above that would occur in the listed CMP special management areas; and 2) the NWP's listed in IV above, except for NWP's #3 and #13 when the activities authorized by them would occur in canals that are more than fifty percent (50%) bulkheaded (see item II above):

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Within thirty (30) days of receipt by DOS of a complete joint New York State Department of Environmental Conservation and U.S. Army Corps of Engineers Permit Application, completed Federal Consistency Assessment Form, and all information and data necessary to assess the effects of the proposed activity on and its consistency with the CMP, including location maps and photographs of the site where the activity is proposed, DOS will inform the applicant and the Corps whether:

- 1) The activity may be authorized by Corps NWP; or
- 2) DOS review of the proposed activity and DOS concurrence with the applicant's consistency certification is necessary. If DOS indicates review of the activity and a consistency certification for it is necessary, the activity shall not be authorized by NWP or other form of Corps authorization unless DOS concurs with an applicant's consistency certification, in accordance with 15 CFR Part 930, Subpart D.

Should you have any questions regarding this consistency decision or wish to meet to discuss the coastal management concerns and implement the alternative measures this Department has identified, please contact Steven Resler at (518) 473-2470 - (e-mail: sresler@dos.state.ny.us).

Sincerely,

George R. Stafford
Director

GRS/SCR

c: OCRM - Charles Ehler
COE/Buffalo District - Paul Leuchner
NYSDEC/Albany - William R. Adriance
NYSDEC/Albany - Pat Riexinger